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In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

FRED LEE DOSTER,
PETITIONER

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21399, filed March 4, 1981, as reproduced in the Petitioner's Appendix at pages 13-17.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the South Carolina Supreme Court properly conclude that the trial judge properly, in his discretion, excluded certain testimony which was subject to the attorney-client privilege and which was irrelevant toward establishing Petitioner's asserted entrapment defense?

STATEMENT OF CASE

Petitioner was convicted in the Court of General Sessions for Richland County, South Carolina, of the offenses of conspiracy to possess and distribute marijuana and possession with intent to distribute maurjuana.

The evidence introduced by the State proved that, on November 17, 1978, Mr. George Anderson, deceased, made a telephone call to Petitioner as a confidential informant acting on behalf of an agent for the Drug Enforcement Administration of the United States Department of Justice. The tape recorded conversation centered around Mr. Anderson's request that Petitioner deliver to him 100 pounds of marijuana. On November 27. 1978, Petitioner met with Mr. Anderson and the DEA agent, Mr. Norman Schumard, in Columbia, South Carolina, for the purpose of effecting the delivery of the 100 pounds of marijuana. When Agent Schmard displayed to Petitioner $30,000 cash (the agreed price for the 100 pounds of marijuana), Mr. Doster told Mr. Anderson "go back to the place, transfer the marijuana to this car and then come back here." Mr. Anderson left and returned in an automobile containing the marijuana in the trunk. When the DEA agent looked into the trunk, Petitioner stated words to the effect. "There it is. Let's get this over with. Let me get out of here." At that point Petitioner was arrested on the charges for which he was convicted.

The only testimony which Petitioner offered to support his assertion of entrapment was the testimony of Mr. Jimmy Grimes, an attorney who had given Mr. George Anderson certain legal advice. It is undisputed that Mr. Anderson sought this legal advice in December, 1978, or January, 1979, after the Petitioner's arrest had taken place and the drug conspiracy had been ended. (See Appendix). Although Petitioner's counsel, in his proffer of proof, asserted that Mr. Grimes would testify that Mr. Anderson admitted to "setting up" Mr. Doster, the witness, in fact, stated to the Court that the conversation was within the attorney-client privilege and that, in any event, the confidence had no bearing on Mr. Anderson, on any of his affairs, or on his guilt or innocence in any matter. (See Appendix). Apparently, the advice which Mr. Anderson sought dealt with "whether or not under a given set of facts a single attorney could represent multiple defendants." Contrary to Petitioner's argument in his Petition, the communication was never alleged to have taken place in the course of the perpetration of a fraud or in the course of the conspiracy in the case.

The Petitioner elected not to testify at trial. He did choose to appeal his conviction to the South Carolina Supreme Court and it was affirmed on March 4, 1981, where the South Carolina Supreme Court fully reviewed the merits of Petitioner's claim.

ARGUMENT

I.

The South Carolina Supreme Court correctly ruled that the trial judge properly exercised his discretion in refusing to admit into evidence the testimony of Mr. Jimmy Grimes, attorney at law, inasmuch as his testimony would have involved a privileged attorney-client communication and because the substance of the communication would have had no bearing on the asserted claim of entrapment; in any event, the evidence of Petitioner's guilt was overwhelming and exclusion of the proffered testimony could not have been prejudicial. **(Petitioner's Question I.)**

Much of Petitioner's argument is simply without factual support in the record. He essentially claims that his rights to due process of law under the United States Constitution were violated because the trial court did not allow him to "establish that the communication was made in furtherance of criminal activity or fraud and was thus admissible as falling within the exception to the general rule of privileged communications." (See Petition, page 9.) This contention was never raised in the trial court essentially because the communication had taken place subsequent to Petitioner's arrest and the termination of the conspiracy. Petitioner's trial counsel only claimed that Mr. Anderson's communication to Jimmy Grimes was not within the scope of the attorney-client privilege, a contention which his counsel now concedes by claiming now that the communication could have been in furtherance of on-going criminal activity. Consequently, this issue is not properly before this Court because it is deemed to be waived under South Carolina procedural rules by failure to present it to the trial court. See *State v. Meyers*, 262 S.C. 222, 203 S.E. 2d 678 (1974); *Taylor v. State*, 258 S.C. 369, 188 S.E. 2d 850 (1972). See cases collected in 7A West's South Carolina Digest, *Criminal Law*, Key Nos. 1043 (3); 1178.

Assuming, for the sake of argument, that this issue has been properly preserved for review, Respondent would respectfully submit that Mr. Anderson's communication to Mr. Grimes could not have been subject to an exception to the attorney-client privilege since it was made subsequent to the termination of the conspiracy, and it only related to whether an attorney would have a conflict of interest in representing multiple defendants under a certain set of facts. The substance of the communication as volunteered by Mr. Grimes completely refuted trial counsel's assertion that it would constitute an admission which would establish the defense of entrapment. Contrary to Petitioner's argument, the record before the South Carolina Supreme Court was more than sufficient to establish the existence of an attorney-client privilege without a recognized exception. Certainly, the glaring difference between trial counsel's proffer and Mr. Grimes' statement as to the substance of the conversation proved that it

would have been of no relevance in establishing the entrapment defense. This record evinces no attempt to thwart the ends of justice by excluding evidence critical to a defense; rather, it demonstrates the proper exercise of the State court's authority in enforcing evidentiary rules necessary to the appropriate administration of the judicial system. The South Carolina Supreme Court has applied this evidentiary rule of law in a manner consistent with prior cases on the subject. *Cf. South Carolina State Highway Department v. Booker,* 260 S.C. 245, 195 S.E. 2d 615 (1973) and *State v. Love,* ___ S.C. ___, 271 S.E. 2d 110 (1980).

Finally, Respondent would respectfully submit that in the face of the overwhelming evidence of guilt introduced against Petitioner in the form of a recorded conversation arranging for the delivery of 100 pounds of marijuana and the DEA agent's testimony concerning the actual delivery of the marijuana, no prejudice could have enured to Petitioner's rights by excluding a rather innocuous question about an attorney's conflict of interest in representing multiple clients.[1] See *Schneble v. Florida,* 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056 (1972).

[1]This argument was presented to the South Carolina Supreme Court in the State's brief, although that tribunal did not appear to rely upon it in its Opinion.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BRIAN P. GIBBES
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ATTORNEYS FOR RESPONDENT.

APPENDIX

MR. ELEAZER: I anticipate that a witness may be called in the defense of the case tomorrow who would testify as to purported conversations that he had with George Anderson concerning his involvement in this case. I expect that if I try to get that testimony out which on its face may appear to be hearsay I will have some objection from the solicitor and if he has any objection to that testimony maybe we can get that straightened out at this time.

MR. MCINTOSH: It's kind of hard for me to know. I haven't heard it. I don't know what it is going to be.

THE COURT: You want to tell him what it is going to be?

MR. ELEAZER: It's going to be testimony that an individual had a conversation with George Anderson and that in that conversation George Anderson stated that he purposely set up this defendant, that he planned the entire transaction in an effort to get back at this defendant for something that this defendant had done and virtually would establish the defense of entrapment.

THE COURT: All right, sir. Do you want to wait till you hear the testimony to argue it Mr. Mac or —

MR. MCINTOSH: Yes, sir.

THE COURT: Do you want to argue it now?

MR. MCINTOSH: I'd rather wait till I hear who the witness is, when, and where the conversation was supposed to have took place. (Tr., p. 113, Line 9 — p. 114, line 7.)

* * *

MR. ELEAZER: May it please the Court, we call Jimmy Grimes as a witness.

THE COURT: Come around, please. Put your left hand on the Bible and raise your right.

JIMMY W. GRIMES

Having been first duly sworn as a witness, was examined and testified as follows:

THE COURT: Be seated. State your name for the record.

THE WITNESS: Jimmy W. Grimes. Your Honor, if it please the Court, I need a ruling on this before I testify. I am an attorney. What I am about to testify to was told to me within the attorney-client privilege.

THE COURT: Yes, sir.

THE WITNESS: The client is now deceased.

THE COURT: Yes, sir.

MR. MCINTOSH: If Your Honor please, the privilege belongs to the client. It doesn't belong to the attorney.

THE COURT: Exactly.

MR. ELEAZER: The client can no longer claim the privilege. He is deceased. It can't hurt him.

THE COURT: That doesn't change it from being an attorney-client privilege. I'll be glad to consider any authority you have, sir. That's just my understanding of the law where there is a relationship between an attorney and a client. Only the client can waive that privilege and allow the attorney to testify. The fact that the client is deceased, that doesn't mean that it is a matter of public record or public information. The fact he can't be hurt from it I don't —

MR. ELEAZER: May it please the Court?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. ELEAZER:

Q. On that particular point, Mr. Grimes, the testimony you are about to give is related to George Anderson. Is that correct?

A. That's correct.

Q. Had you ever in the past represented George Anderson?

A. George Anderson? No, sir.

Q. Had you ever been retained to represent George Anderson?

A. No, sir.

Q. Had George Anderson ever kept an appointment with you at your office?

Q. Now when you answer that question, I ask you, Mr. Grimes, if on the particular occasion in question whether or not he had an appointment or whether he just showed up in your office on that occasion?

A. It's my understanding that he called and said he might be by. There was no definite time. I can't recall at this time — it's been six months or more — whether or not he was actually on the calendar to come in at a given hour or whether he just happened to come into the office.

Q. All right, sir. And this conversation that you say may be privileged, when did that take place?

A. It was in late '78 or early '79, December or January this past.

Q. Has Mr. George Anderson ever paid you any sums of money for representation?

A. No.

Q. Did you ever undertake to represent him in any legal matter whatsoever?

A. No.

Q. Did you merely on this occasion listen to Mr. Anderson's story and advise — and give him no legal advice whatsoever?

A. He had a situation that he wished for me to give him an opinion as to whether another attorney would have a conflict of interest and the reason he was at my office was he could not disclose this matter to the other attorney at that time.

Q. All right, sir. So you just gave him a legal opinion as to what his situation was. Is that correct?

A. That's correct.

Q. After hearing his story. Is that correct?

A. That's correct.

Q. And he paid you no sums of money whatsoever?

A. That's correct.

Q. And you undertook in no sense to represent him in any matter. Is that correct?

A. That's correct.

MR. ELEAZER: Your Honor, I would submit that the conversation with Mr. Anderson was not within the attorney-client privilege.

THE COURT: All right. Well, now, Mr. Eleazer, often times I gave free advice to people for which I was not paid where an attorney-client privilege existed. However, I think the attorney — the Court is not going to abdicate its responsibility to make a ruling in the matter but I ask you, Mr. Grimes, do you consider to have had an attorney-client relationship with George Anderson at the time in question and concerning or pertaining to the information which you gave to him?

THE WITNESS: Yes, sir.

THE COURT: I will be glad to hear from you, Mr. McIntosh.

MR. MCINTOSH: May I ask the witness just one or two questions?

THE COURT: As many as you like, please.

CROSS EXAMINATION

BY MR. MCINTOSH:

Q. This conversation took place at your law office, Mr. Grimes?

A. Yes, sir.

Q. And he came to see you as an attorney?

A. Yes.

Q. And he sought a legal opinion from you?

A. Yes.

MR. MCINTOSH: That's all I have.

RE-DIRECT EXAMINATION

BY MR. ELEAZER:

Q. Mr. Grimes, would the legal opinion he sought have any effect on any of his legal rights?

A. No.

Q. It would be strictly a question as to whether or not there was a conflict in representation with another lawyer?

A. That's correct.

Q. And it was not legal advice which he himself could act or rely upon? Is that correct?

A. That's correct.

MR. ELEAZER: Your Honor, we would submit it is not within the privilege.

MR. MCINTOSH: If Your Honor please, I believe the law is clear. It makes no difference whether an attorney is paid a fee or whether he undertakes representation. If a client comes to see a lawyer in his capacity as a lawyer and seeks legal advice the attorney-client privilege attaches at that time. It matters not whether a fee is paid or representation is undertaken.

THE COURT: Anything further, Mr. Eleazer?

MR. ELEAZER: Your Honor, I would submit that he asked for an opinion as far as representation but sought no legal advice in his private individual capacity and, or course, I understand that payment of a legal fee is not one of the things to be considered but I think it goes to the fact that there was no legal fee paid, that there was no representation, that he took on no job for him, that he gave him no legal advice per se but merely rendered an opinion as to whether or not he could use a different lawyer.

THE COURT: All right, sir. Well, I am not going to allow the testimony because I feel that it was an attorney-client relationship and, of course, Mr. Grimes has testified that he felt that it was an attorney-client relationship and I do not deem it proper unless — that's subject to Mr. Grimes. If he is desirous of proceeding in the matter.

THE WITNESS: Your Honor, my opinion is what the client or the decedent told me at that time has no bearing on himself, any of his affairs, nor his guilt or innocence in any matter. The question that he asked me concerned primarily was whether or not under a given set of facts a single attorney could represent multiple defendants.

THE COURT: Yes, sir. I understand what you are —

THE WITNESS: The divulgence would not be —

THE COURT: — saying but the fact as to whether or not it would be incriminating, that is not the test of whether or not an attorney-client privilege can be waived. I sustain your objection, Mr. McIntosh, in the matter.

MR. ELEAZER: Your Honor, we would proffer —

THE COURT: Note it for the record, of course.

MR. ELEAZER: We would proffer the testimony to the Court itself.

THE COURT: All right, sir. Fine.

MR. ELEAZER: Can we go into his testimony just to the Court and the court reporter?

THE COURT: What say, Mr. McIntosh?

MR. MCINTOSH: I object to it.

THE COURT: Well, the problem you're getting into is that you are divulging it to do that, Mr. Eleazer.

MR. ELEAZER: Divulging it only to Your Honor, only to the Court.

THE COURT: Well, if it is in the record and it goes to the Supreme Court then the record in the Supreme Court transcript is not confidential.

MR. ELEAZER: I understand that. That's the only way we can get it in and have the Supreme Court rule on it.

THE COURT: All right. Well, I decline to grant your motion, sir.

MR. ELEAZER: Very good, sir. Come down, Mr. Grimes.

(Witness excused.)

MR. ELEAZER: One further question of Mr. Grimes, please.

THE COURT: You are still under oath. Just ask him right there.

BY MR. ELEAZER:

Q. Mr. Grimes, the information you have —

THE COURT: Like you have been doing.

MR. ELEAZER: I'm not going to lead him, sir.

THE COURT: Again.

MR. ELEAZER: Again.

THE COURT: All right.

BY MR. ELEAZER:

Q. Mr. Grimes, the information that you possess which the Court has ruled was not admissible under the attorney-client privilege, in your legal opinion if that information were divulged in court would it be beneficial to the defense of this case?

MR. MCINTOSH: I object. That calls for —

MR. ELEAZER: He is an attorney.

THE COURT: I understand. That's not a proper question, Mr. Eleazer.

MR. ELEAZER: All right, sir.

(Tr., p. 118, line 24 — p. 126, line 19.)